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No. 89-775

In The

Supreme Court of the United States

October Term, 1989

GASTON COUNTY BOARD OF EDUCATION, THE STATE OF NORTH CAROLINA, AND THE NORTH CAROLINA STATE BOARD OF EDUCATION,

Petitioners,

v.

KAREN LEIGH SHOOK, BY AND THROUGH HER GUARDIAN AD LITEM, WENDY SHOOK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Fourth Circuit erred in tolling the state's statute of limitations applicable to Respondent Karen Leigh Shook's claim?

2. Whether the Fourth Circuit erred in finding Karen Leigh Shook has standing to bring this action?

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BRIEF IN OPPOSITION

Respondent Karen Leigh Shook respectfully requests that the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit be denied.

STATEMENT OF THE CASE

Respondent Karen Leigh Shook is a multiply-handicapped, incompetent adult. She is a specially-named, individual beneficiary under a group health insurance policy issued by Tultex Corporation and Pilot Life Insurance Company based on the employment of her father. Mr. Shook continues to be employed by the Tultex Corporation. Karen continues to be eligible to receive special therapeutic services under the terms of the group health insurance policy because at the time she became an adult she continued to be disabled by reason of mental retardation.

The separate group insurance benefit provided directly to Karen is a rare, even unique situation. At the time that the Tultex Corporation offered a position to Karen's father, they reached a special agreement that Tultex, through Pilot Life Insurance Company, would self-insure Karen, individually, to provide an available lifetime benefit for special therapeutic services relating to mental and nervous disorders. Petition App. at 3A. As found by the circuit court, Karen was specifically named in documents creating this agreement between the employer and her father.

Prior to February 1980, Karen attended the public schools in North Carolina, including the schools operated by Petitioner Gaston County Board of Education. In February 1980, following her severe behavioral breakdown and an extended inpatient psychiatric hospitalization, Karen's parents placed Karen at The Brown Schools in Austin, Texas, where she received a highly structured educational residential program.

Shortly after Karen's entry into the Brown Schools program, Karen's parents made demand that free appropriate residential education be provided for her by Petitioner Gaston County Board of Education, the local educational agency ("LEA"). From February 1980 through September 1982, the insurance policy payments for Karen's attendance at The Brown Schools depleted more than $64,000.00 from her available lifetime reserve coverage under the policy which was a maximum $100,000.00. Karen's father separately paid over $40,000.00 on the same account. Petition App. at 6A.

Karen's parents retained attorney James C. Fuller to represent them in seeking an appropriate educational program for Karen from the LEA. Mr. Fuller's affidavit of record shows that he only represented Karen's parents, and never was authorized nor sought to represent Karen.[1] The parents never asserted the separate pecuniary losses of their daughter as a ground for complaint. Eventually, Mr. and Mrs. Shook chose not to pursue an administrative hearing to resolve their own disputes with the Petitioner LEA.

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[1] Petitioners contend that during the time in which the parents and the LEA contested the appropriate education and placement of Karen "The County Board and its counsel received no further communications from *Ms. Shook* her parents or *attorneys* until 1986 . . . " (Petition at 8) (emphasis added). Karen was incapable of communicating with the County Board and the implication that Karen herself was represented by counsel before this action was filed is contradicted by the record.

Karen attained the age of majority (18) on February 9, 1984. On July 9, 1984, Karen was declared legally incompetent in a state court proceeding and became the ward of a court-appointed guardian. This action was filed by Karen, appearing through a guardian *ad litem*, on December 8, 1986, alleging a claim for relief under the Education for All Handicapped Children Act ("EAHCA"), 20 U.S.C. 1406-1461. Respondent alleged that she was entitled to recover reimbursement for the depletion of insurance benefits available to her under the insurance policy as an intended third-party beneficiary. Respondent alleged that the LEA had failed to provide appropriate special educational services and that Karen's insurance coverage reserve had been depleted in the acquisition of appropriate private special educational services at The Brown Schools. The ultimate factual issues underlying this claim have yet to reach adjudication at any stage of the proceedings below, although Petitioners represent to this Court numerous factual statements which are without basis in the record below.

The LEA filed a motion for summary judgment contending that a three-year statute of limitations barred Karen's claim.

The district court rejected the LEA's contention that Karen's claim was barred by the statute of limitations. Petition App. at 11A. However, the district court granted summary judgment to the LEA based on its decision that Respondent lacked standing to bring the reimbursement action, concluding that "Plaintiff herself has suffered no damages." Petition App. at 12A. Respondent's motion to alter or amend the judgment was denied by the district

court "with continuing regret that [it had] no authority to do otherwise." Petition App. at 14A.

The Respondent appealed the district court's decision. Neither the LEA nor the third party defendants, Petitioners State of North Carolina and North Carolina State Board of Education[2], cross-appealed the district court's decision on tolling.[3] The Court of Appeals affirmed the district court holding regarding tolling of the statute of limitations, vacated the district court decision regarding Karen's standing to litigate the claim, and remanded the action to the district court for trial.

REASONS FOR DENYING THE WRIT

Petitioners overstate the import of this case in several ways. First, Petitioners assert that the Fourth Circuit Court of Appeals' decision to apply state law tolling the statute of limitations as to Respondent's claim conflicts with a decision in the Ninth Circuit Court of Appeals. Second, Petitioners assert error in the circuit court decision, contending that tolling of the limitations period imported from state law into EAHCA contravenes federal

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[2] At the time of the appeal to the circuit court, the third party defendants gave notice that they would not be parties of record on appeal. Yet, the third party defendants now are joined with the third party plaintiffs as petitioners for writ of certiorari.

[3] The LEA argued to the circuit court that it should affirm the district court judgment, even though there may be standing, because the statute of limitations had run. Petition App. at 3A, n. 1.

policy expressed in EAHCA. In a related argument, Petitioners claim that applying tolling rules to state limitations law in EAHCA cases will create hardships for public educational agencies in the administration of the EAHCA. Further, Petitioners assert error in the decision below regarding Karen's standing to bring the action.

A writ of certiorari is not warranted in this case. The alleged conflict between the two circuits can be reconciled by the distinguishable facts of the cases. In the EAHCA, Congress by its silence has left to the states the task of setting time limits for bringing an action. Congress could have explicitly provided a limitations period if the general concept of tolling during legal disability was so clearly in opposition to the policy underlying EAHCA. Courts have agreed that the EAHCA must be interpreted broadly to cover all handicapped children and their unique needs. So too must the broad application of state limits and tolling rules be applied to protect the rights of children under the EAHCA. The Ninth Circuit decision upon which the Petitioners rely is in error in its interpretation of federal policy, and in error in its resolution of the issue of tolling of the statute of limitations.

The *in horrorem* arguments of the Petitioners are similarly feeble. There has been no showing that application of tolling rules will be difficult or burdensome to apply. There is a well established, simple procedure for ensuring the protection of the handicapped child's separate pecuniary interests in those few cases in which the issue may arise.

The decision below was correct on the issue of standing, as well. Karen Shook had a separate property interest

in the insurance benefits. That property interest was depleted in order for her to receive an appropriate education at private expense. That insurance fund still would be available to her today, but for the failure of the LEA to provide an appropriate program at public expense. Karen plainly is within the class of persons to whom the EAHCA provides protection. Thus, Respondent has alleged injury in fact and an injury within the zone of interests of the statute under which she proceeds. Respondent's complaint should not be dismissed under prevailing standing jurisprudence.

Finally, this case does not reach the requisite level of importance to justify certiorari because the issues so rarely arise, and affect only a few cases and a relatively small number of handicapped children.

I. CONFLICT BETWEEN CIRCUITS DOES NOT WARRANT THE GRANTING OF THE PETITION IN THIS CASE.

The Petitioners suggest a conflict in the decision of the Fourth Circuit, in this case, and the decision of the Ninth Circuit in *Alexopulos v. San Francisco Unified School District*, 817 F.2d 551 (9th Cir. 1987). In *Alexopulos*, the Ninth Circuit held that borrowing the California tolling rule under the state statute of limitations would undercut federal policy favoring resolution of disputes under EAHCA at the earliest time possible. *Alexopulos, supra*, 817 F.2d at 555-556. In the present action, the Fourth Circuit held that application of the North Carolina tolling rule to a claim for reimbursement of private educational

expenses would not be inconsistent with the federal policy underlying that cause of action. Petition App. at 4a.

The apparent conflict can be reconciled, without the issuance of this Court's writ, by close reading of distinguishable facts in these two cases. In *Alexopulos*, the action was brought on behalf of the handicapped child by his mother, alleging claims under Section 504 of the Rehabilitation Act, 29 U.S.C. 794, and under EAHCA. *Id.*, at 554-555. The plaintiff parent presented a claim for reimbursement of her past private educational expenses incurred in 1974 and 1975, but only alleged the reimbursement claim under Section 504. *Id.* Mrs. Alexopulos alleged a separate claim under the EAHCA, for compensatory education, claiming that the school district's procedural violations in 1979 had resulted in her son's exclusion from school. *Id.* at 555. Significantly, Mrs. Alexopulos *"concede[d] that Alexis [the handicapped child] spent no money of his own on his education."* *Id.* Thus, in the Ninth Circuit case, the EAHCA claim involved no allegation of a loss or depletion of the separate financial resources of the handicapped child.

In the present case, the EAHCA claim is based solely on the allegation that Karen's own financial resources were depleted. Her claim is, not that she lost time in school, but that she lost money paying for private special education which should have been provided free by the public educational agency. The nature of the claim being asserted can, and should, make a difference for purposes of applying federal policy to determine the propriety of importing into the federal statute a tolling provision created by state law. The provision of education for a child traditionally is within the common law authority and

duty of the parents. *Burge v. City and County of San Francisco*, 41 Cal. 2d 608, 262 P.2d 6 (1953); 3 R. Lee, *North Carolina Family Law* 187 (Michie 1981). Disposition of the separate property, or waiver of claims of a child, however, are not within the natural common-law rights of parents. *Burge, supra; Sell v. Hotchkiss*, 264 N.C. 185, 141 S.E.2d 259 (1965). North Carolina law requires court approval and supervision of parents acting on behalf of their child when the issues involve the child's financial interests or property. *Genesco, Inc. v. Cone Mills Corp.*, 604 F.2d 281 (4th Cir. 1979). North Carolina law does not require court supervision of parents acting on behalf of their child when the issue is the quality and quantity of services to be provided to the child by an educational agency.

The nature of the claim asserted by Mrs. Alexopulos was for compensation for education not provided. At the time the claim arose, Mrs. Alexopulos had both the authority and duty at California common law to assert and defend her child's entitlement to special educational services. As the *Alexopulos* court noted, Congress undoubtedly intended to encourage prompt resolution of disputes regarding the affirmative, prospective provision of educational services to handicapped children. Nothing in this goal of the EAHCA would require an alteration of the well-established relationship between parent and child, with regard to the actual provision of educational services to the child.

However, Karen's claim under EAHCA never has been for the replacement of services which were denied her. Karen's claim is for reimbursement of the financial

costs she individually suffered to obtain appropriate private educational services. Karen's claim is related to, but distinct from, any claim her parents were able to assert on her behalf for the provision to her of appropriate education. In contrast, Mrs. Alexopulos' claim, and her son's claim, for compensatory educational services, are identical. For both of them, the claim arises directly from the denial of any educational services, as to which Mrs. Alexopulos was the natural guardian of her child at the time the claim accrued. However, at the time Karen's claim accrued, her parents had no legal authority to waive, release or compromise her contract rights to insurance benefits, or her right under EAHCA to be paid reimbursement for those lost benefits. *Genesco Inc. v. Cone Mills Corp., supra.* With regard to the particular claim being advanced here, Karen was without legal representation. The *Alexopulos* court specifically noted:

> We do not decide whether the statute tolls for a child without representation (for example, when a school district does not appoint a surrogate as required by 20 U.S.C. 1415(b)(1)(B).

Alexopulos, supra, at 556, n. 7. Under North Carolina state law, Karen was not legally represented with regard to claims concerning her separate property. To read into the statute a federal policy requiring the parents to assert such an action on behalf of their child, at risk of the child's claim being extinguished, does work an implicit preemption of state law governing the relationship between parent and child.

This case is factually unique when compared with *Alexopulos.* Karen Shook was identified individually as a special third-party beneficiary under a group insurance

policy, arranged between her father and his employer. That beneficial interest was lost to Karen because she was forced to procure private educational services which the Petitioner LEA would not provide. While in *Alexopulos* it was conceded that the handicapped child suffered no personal financial loss, in the present action the essence of Respondent's claim is her own personal financial loss. Thus, the Fourth Circuit and the Ninth Circuit were not presented with the same cause of action, and the opinions in the two circuit courts therefore are not in true conflict.

II. THE FOURTH CIRCUIT DID NOT ERR IN REVERSING THE DECISION OF THE DISTRICT COURT.

A. The Fourth Circuit Addressed The Policy Underlying The EAHCA And The Rule Of Tolling.

Petitioners contend that the borrowing of North Carolina's statute of limitations, and the use of its rule for tolling the period of limitations, are inconsistent with federal policy underlying the EAHCA. Petitioners assert that the Court of Appeals ignored the precedent of *Board of Regents v. Tomanio*, 446 U.S. 478, 100 S. Ct. 1790, 64 L. Ed. 2d 440 (1980), and *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 95 S. Ct. 1716, 44 L. Ed. 2d 295 (1975). Petition at 9. Petitioners further assert that the policy behind the EAHCA was not even discussed by the circuit court in its decision below. *Id.*

The primary issue before the circuit court was that of standing. Yet, contrary to Petitioners' assertion, the Fourth Circuit addressed the issue of tolling, and the underlying policy of the EAHCA, in a footnote in its

decision. Petition App. at 5A, n. 2. The circuit court declared that the importation of the state tolling provision into EAHCA is not contrary to federal policy and followed the Second Circuit in *Vander Malle v. Ambach,* 673 F.2d 49, 52 (2d Cir. 1982)

> . . . Such a suit is properly maintained both by the child and its parents. That being true, the exercise of a state tolling provision in favor of the child should not deter the parents from bringing a suit at an earlier time. *Id.*

B. The Policies Underlying North Carolina's Tolling Statute And The EAHCA Are Consistent.

The policy underlying North Carolina's tolling statute is consistent with the policy underlying the EAHCA. Each law is written to protect children. Each law presumes that the child lacks capacity to act in his or her own behalf. Again, North Carolina law requires court approval and supervision of parents acting on behalf of their child when the issues involve the child's separate financial interests or property. *Genesco, Inc. v. Cone Mills Corp., supra.*

However, EAHCA does not draw a distinction between the child's financial interests and the child's personal interests in appropriate education. Congress understood that financial disputes with public educational agencies might arise in cases involving residential programs. *See, Burlington School Committee v. Department of Education,* 471 U.S. 359, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985). Congress did not specifically foresee the possibility that the financial loss might be borne by the child's separate estate, not by the parents. Thus, unlike state

limitations law, EAHCA makes no specific provision for protection of the separate pecuniary interest of the child. This statutory lacuna has been filled, in the present action, by the application of the tolling rule which protects the separate interest of the child during minority. Failure to toll the statute of limitations in the present case fundamentally alters the legal relationship between parent and child, a matter traditionally left to the states to govern. As Petitioners would have it, parents would have the authority under EAHCA to pursue or not pursue, waive or compromise their child's separate property interest for reimbursement of educational expenses incurred by the child.

Further, failure to toll the limitations period during the infancy of the child, in cases in which the child has a separate legal claim, fundamentally alters the state limitations law itself.

> [Cases such as *Tomanio*] are best explained not by 42 U.S.C. 1988 . . . but by the inseparability of the time period itself from some (though not necessarily all) other provisions of a state's limitations law. [Citation omitted] The actual generosity of a statute of limitations depends not only on the nominal period within which suit must be brought but on provisions allowing that period to be extended for various reasons, so that if the federal court borrows just the period it may in fact be giving plaintiffs more or less time than the state that enacted the borrowed statute would have thought appropriate in the circumstances.
>
> . . .
>
> Doctrines such as laches, tolling and estoppel affect the length of time available to sue. They

> are integral to the complex of rules that makes up the entire period of limitations – "period", not "statute", being the key to understanding.

Lewellen v. Morley, 875 F.2d 118, 120-121 (7th Cir. 1989). Thus, while overriding federal policy might persuade a federal court to reject the adoption of state tolling provisions while absorbing the state's general limitations period in a federal statute, the federal policy ought to be sufficiently clear and applicable to the facts of the case to justify what amounts to a permutation of the actual limitations period.

The *Alexopulos* court assumed the federal policy underlying EAHCA to be "to assure appropriate education for handicapped children at the earliest time possible. Failure to act promptly could irretrievably impair a child's education." *Alexopulos, supra*, 817 F.2d at 556. Again, the Ninth Circuit had before it a case in which the issue was the alleged exclusion of the child from all educational services. Under such circumstances, the potential for irretrievable loss of educational opportunity is manifest, and a policy of swift pursuit of EAHCA remedies could be deemed overriding. In the present action, and in every reimbursement action under EAHCA, *see, e.g., Burlington School Committee, supra*, the nature of the claim always is that the child *has* received appropriate educational services and *has* avoided irretrievable impairment of educational progress – at private expense. Therefore, in reimbursement claims, the criticality of assuring the prompt provision of appropriate services to the child is diminished, and the need for prompt resolution of the complaint should be weighed against other competing interests.

In the present action, the competing interest is the protection of the child's separate property rights. The *Alexopulos* court, while advertent to the right of the parent to pursue a reimbursement action for private educational expense, *see*, 817 F.2d at 556, n. 6, was not faced with and did not recognize the possibility presented by the case at bar: the child may be the person who pays for the private education. This circumstance arises not only in the context of a beneficiary interest under an insurance contract, as here, but also in the case where the child is the owner of money or property or the beneficiary of a trust. The Fourth Circuit correctly recognized the child's separate interest in this case, and noted that application of the tolling rule in this particular case should not deter parents in the usual EAHCA case from promptly pursuing programmatic and placement issues with the school system, which is the traditional role of parents. As this Court has noted, "parents and guardians will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled by the Act." *Board of Education v. Rowley*, 458 U.S. 176, 207, 102 S. Ct. 3034, 3050, 73 L. Ed. 2d 690 (1982). Thus, the Fourth Circuit has correctly reconciled the policy interests expressed by the EAHCA and the state statute of limitations.

C. Petitioners Confuse the Issues of Tolling and Standing.

Petitioners seem to assert that the standing issue as decided below also represents a conflict with the decision in *Alexopulos*, raising the need for the grant of certiorari. Again, it is quite clear upon examination of the two cases

that the facts before the Ninth Circuit were that no personal loss of funds or property of the child was alleged. The decision of the Fourth Circuit represents a careful appraisal of Karen Shook's claim of injury to her own property. The court below determined that principles of North Carolina law, applied to the facts of record, characterized Karen as an intended beneficiary of the insurance contract between her father and his employer. Petition App. at 6A-8A. On this basis, the Fourth Circuit concluded that Karen had alleged the requisite personal stake in the outcome of the litigation to confer upon her the standing to bring the action in her own name. The two cases are factually distinguishable and, thus, to the extent that the *Alexopulos* decision addresses standing (which is not readily apparent from that opinion), there clearly is no conflict.

Petitioners also assert that this court in *Burlington School Committee, supra,* explicitly approved a reimbursement remedy only to parents, and claim that the child never can be a proper plaintiff in a reimbursement action. This argument misses the mark for the simple reason that this Court was not called upon in *Burlington School Committee* to consider the issue of the child's right to reimbursement. The *Burlington School Committee* case arose solely from the parents' claim to reimbursement on the facts of that case. To infer from the Court's pronouncement – that parents may sue for reimbursement – that children may not sue for reimbursement is an obvious logical fallacy. The Petitioners advance, in this Court, the strained semantic theory that, because this Court said "parents can sue," this Court meant "only parents can sue." Except

for the necessity imposed by the Petition, serious response to such obtuse literalism would not be required.

It is plain from the language of the Act that children are entitled to bring actions under EAHCA. The rights conferred by the Act are conferred upon the handicapped child. 20 U.S.C. 1400(c); 20 U.S.C. 1401(a)(16); 20 U.S.C. 1412(1); 20 U.S.C. 1415(a). While the procedural safeguards specifically allow parents or guardians certain procedural rights, the procedural safeguards are guaranteed to "handicapped children and their parents." 20 U.S.C. 1415(a). The Act requires that procedural protections "shall include, but shall not be limited to" the opportunity for parents to present complaints. The right to appeal administrative decisions into federal or state court is conferred upon "any party aggrieved by the findings and decision." 20 U.S.C. 1415(e)(2).

Thus, Petitioners' arguments concerning Karen's standing were properly rejected by the circuit court. Petitioners, in order to bolster their position, attempt to argue in this Court facts which are matters for trial. Whether or not the insurance policy provided only for treatment of mental and nervous disorders, providing no coverage for educational expenses, does not raise a clear basis for the denial of Karen's reimbursement claim. There are therapeutic services which may be covered for health insurance purposes and still be the responsibility of the public educational agencies within the meaning of EAHCA. *See, Massachusetts v. Secretary of HHS*, 816 F.2d 796 (1st Cir. 1987), *affirmed in part, reversed in part on other grounds, Bowen v. State of Massachusetts*, 487 U.S. ___, 108 S. Ct. 2722, 101 L. Ed. 2d 749 (1988) (school personnel's training of mentally retarded persons in such skills as dressing

and feeding oneself are reimbursable rehabilitative services for purposes of Medicaid program).

III. THE QUESTIONS PRESENTED DO NOT WARRANT A GRANT OF CERTIORARI BECAUSE OF THEIR LIMITED IMPORTANCE.

The grant of a writ of certiorari is purely discretionary, *Hicks v. Miranda*, 422 U.S. 332, 344, 95 S. Ct. 2281, 45 L. Ed. 2d 223 (1975), and is granted only when important issues of federal law are presented and warrant resolution by this court. Rule 17, U.S. Sup. Ct. Rules. *See, U.S. v. Oregon*, 366 U.S. 643, 645, 81 S. Ct. 1278, 6 L. Ed. 2d 575 (1961); *Pennsylvania v. Nelson*, 350 U.S. 497, 499, 76 S. Ct. 477, 100 L. Ed. 640 (1956); and *Rice v. Sioux City Mem. Parks Cemetery*, 349 U.S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1955). The issues presented by Petitioners do not rise to the level of importance which would dictate issuance of the writ of certiorari. There are few situations in which the decision below will have any impact. Other than the opinion below and *Alexopulos*, the tolling provision applicable to a statute of limitations under EAHCA has been mentioned in only one other reported case, and then only indirectly. *Gerasimou by Gerasimou v. Ambach*, 636 F. Supp. 1504 (E.D.N.Y. 1986). In the fifteen years since the enactment of the EAHCA there has been little litigation over the issue of a handicapped student having standing to sue under the EAHCA. There has been even less litigation over the tolling of a limitations statute. There is good reason for this. The issue, when it arises, is rarely a financial one, and even rarer still when the finances in question are the handicapped student's own resources.

Therefore the questions raised by the Petition have little practical impact on a national basis.

Petitioners also raise the specter of a burdensome process which educational agencies would have to pursue to ensure the prompt extinguishment of independent claims of handicapped students. As noted, separate representation of the child's interest can only be an issue in one narrow context: when the facts show that private educational services have been purchased with the child's own funds. What must the State and local educational agencies do to ensure that this claim is properly advanced? Simply, they must determine whether the handicapped child has been receiving private educational services, and they must determine the source of payment for those private educational services. This inquiry can be informal, but in North Carolina the agencies affected will have the opportunity in every due-process hearing to engage in formal discovery of the sort provided by the federal Rules of Civil Procedure. This is so because the administrative hearings required under EAHCA now are conducted in North Carolina by administrative law judges under the state Administrative Procedure Act. The North Carolina Office of Administrative Hearings has adopted procedural rules which include "any means of discovery available pursuant to the North Carolina Rules of Civil Procedure, G.S. 1A-1." Title 26, N. C. Administrative Code, Ch. 3, Section .0012.

If, through informal inquiry or in discovery in a contested case under the Act, the LEA learns that a separate property interest of the handicapped child is implicated, the LEA need only apply for the appointment by the ALJ of a guardian *ad litem* for the child. Rule 17 of the

Rules of Civil Procedure applies in these hearings under North Carolina law. *See*, Title 26, N. C. Admin. Code, Ch. 3, Sec. .0001. In short, Petitioner State of North Carolina has in place a simple, commonly accepted means of ensuring that a handicapped child's separate claims are properly represented in those few cases in which the issue might arise. The process is no more burdensome nor mysterious than that required in any other civil litigation in which a child's interests may differ from or be legally unrepresented by the interests of the parents. Thus, the Petitioners are suggesting, as grounds for issuance of the writ, a theoretical problem which does not in fact exist.

The Petitioners contend that decisions of public school systems, deliberately and knowingly left unchallenged by the child's parents at the time, should not remain grounds for litigating years later. Respondent agrees. Respondent asserts that such is not the case before this court. The rare, even unique claim by Karen for her own financial reimbursement is the basis of her standing to litigate many years later. Karen's separate financial interest never was asserted by her parents, and under state law could not have been effectively asserted by her parents. Regardless of the intention of the child's parents concerning litigating issues of educational program and placement, the primary consideration of the school system should be in protecting whatever interest the child may have individually at the time that the issue arises. The civil procedures for achieving this goal are within easy reach of the Petitioners.

CONCLUSION

For the foregoing reasons, the Respondent, Karen Leigh Shook, respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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